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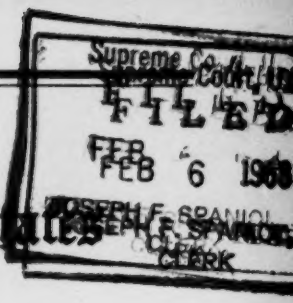

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES D. KIRK,

Petitioner,

v.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., HENRY K. FINE, M.D., E.R. SQUIBB & SONS, INC., and SMITHKLINE CLINICAL LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS, MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., AND HENRY K. FINE, M.D.

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Respondents, MICHAEL REESE HOSPITAL AND MEDICAL CENTER,* IRVING H. TRACER, M.D., AND HENRY K. FINE, M.D., respectfully request that this Court deny the petition for a writ of certiorari to the Supreme Court of Illinois. That opinion is reported at 117 Ill. 2d 507, 513 N.E. 2d 387.

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* Pursuant to Supreme Court Rule 28.1, Michael Reese Corporation is the parent company of Michael Reese Hospital and Medical Center. Michael Reese Second Century Foundation, Michael Reese Health Network, Health Outreach, EMRE, and Michael Reese Health Plan are affiliates.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE ILLINOIS SUPREME COURT'S DECISION TO HEAR THIS CASE DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHTS.

Petitioner's attempt to make a constitutional issue out of the Illinois Supreme Court's decision to review the decision of the Illinois Appellate Court in this case borders on the ludicrous. Indeed, petitioner did not raise any constitutional challenge in opposition to respondents' motion for leave to file a motion for reconsideration and in fact filed no response in opposition to the motion whatsoever. Moreover, petitioner's 102 page Supreme Court brief uttered not one word in opposition to the method by which the Supreme Court granted review. It was only in the petition for rehearing, after petitioner had lost on the merits, that the issue was first raised. *See, Herndon v. Georgia,* 295 U.S. 441, 443 (1935) (attempt to raise constitutional issue for first time in state court petition for rehearing comes too late unless actually considered and decided by state court).

Furthermore, no matter when raised, petitioner's contention of a secret, covert, improper procedure is wholly without merit when:

1) The procedure for filing a motion for leave to file a motion for reconsideration was followed in numerous prior cases including *Johnson v. Colley,* 490 N.E. 2d 685, 111 Ill. 2d 468 (1986), *cert. den.* 107 S. Ct. 113, 93 L. Ed. 2d 60 (1986), a decision which was published by the Illinois Supreme Court almost three weeks *prior* to the filing of the respondents' motion in this case.

2) The *Colley* case rejected the same constitutional arguments raised by petitioner herein, noting that under the provisions of Article VI, Sections 4, 6 and 16 of the Illinois Constitution of 1970, the Illinois Supreme Court is vested with rule making authority sufficiently comprehensive to regulate all aspects of the appellate process (*Colley, supra,* 490 N.E. 2d at 606-687).

3) The Illinois Supreme Court, like all other courts of appeal, has the inherent power to reconsider any order or decision, *Whitcanock v. Nelson,* 81 Ill. App. 3d 186, 400 N.E. 2d 998 (3d Dist. 1980).

Petitioner's further assertion that there was something improper or sinister in the fact that respondents filed their motion for leave to file a motion for reconsideration with the individual justices of the Illinois Supreme Court at their home offices (Petn., p. 5) has been a requirement in the Supreme Court rules since 1982! Ill. Ann. Stats., Ch. 110A, Section 361 (Committee Comments, p. 16). Nothing in the cited cases of *United States v. Nixon,* 418 U.S. 683 (1974) or *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) supports any aspect of petitioner's argument. *Nixon* involved the enforcement of a subpoena *duces tecum* under Fed. Rule Crim. Proc. 17(c). *Logan* held that a party could not be deprived of judicial review of his case simply because certain procedures had not been carried out by a state agency in a timely fashion. Here, petitioner's non-sequitur contention is that somehow error occurred because the Illinois Supreme Court did grant review and did decide the case on its merits.

Petitioner's procedural arguments are unfounded.

II.

THE ILLINOIS SUPREME COURT DECISION HAS NOT GRANTED "BLANKET IMMUNITY" TO PHYSICIANS OR OTHER MEDICAL CARE PROVIDERS.

Petitioner's repeated overstatements and misstatements of the Illinois Supreme Court's decision do not create a constitutional issue—particularly when no such constitutional issue was ever presented in the state court at any time, *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (Supreme Court lacks jurisdiction over constitutional question never raised or decided below) and the case was decided solely on state tort law grounds, *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) (Supreme Court will not review state court judgments that rest on adequate and independent state law grounds).

Furthermore, the Illinois Supreme Court did not hold that "a doctor who prescribes psychotropic drugs now has no legal obligation to convey a thirty second warning to the patient not to operate a motor vehicle or consume alcohol while under the influence of mood-altering medication" (Petn., p. 17). On the contrary, the Illinois Supreme Court expressly recognized that the physician in this case acknowledged "a duty to warn his patient about adverse effects that may result from taking a prescription drug" (Appndx. Petn., p. 17a). However, the Illinois Supreme Court sensibly held that this duty to warn should not be extended beyond a physician's patients to the world at large, thereby subjecting physicians and hospitals to boundless liability to an unknown and unlimited class of people who were never treated by any physician and were never a patient at any hospital.

Contrary to petitioner's contention, similar limitations have been applied to professional tort liability in other

fields as well. *See e.g., Pelham v. Griesheimer*, 92 Ill. 2d 13, 17, 440 N.E. 2d 96 (1982) (attorneys not liable to all foreseeable claimants as a result of malpractice); *Badische Corp. v. Arnold Caylor*, 825 F.2d 339 (11th Cir. 1987) (accountants not liable to all foreseeable persons relying on negligently prepared financial statement).

Furthermore, the Illinois Supreme Court soundly distinguished the authorities relied upon by petitioner (Petn., p. 18), as cases involving situations where defendant had actual control of the "physical custody" of the person alleged to be dangerous or to have dangerous propensities (Appndx. Petn., p. 18a).

The Illinois Supreme Court's decision is sound state tort law, and in no event presents any constitutional issue for this Court's review.

CONCLUSION

For the above stated reasons, as well as those reasons and authorities set forth in the Briefs in Opposition filed by E. R. Squibb & Sons, Inc. and SmithKline Clinical

Laboratories, Inc., these respondents respectfully urge this Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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